A. *Internet Service Providers: Conduit, Gatekeeper, or Speaker?*

As already discussed, current First Amendment doctrine determines the level of protection afforded a media entity based upon certain conceptual categories. Accordingly, under this framework, we must ask whether Internet service providers are more like common carriers, speakers, or gatekeepers. Unfortunately, the answer to this question is an unenlightening, yes. ISPs, cable and otherwise, perform functions and provide services similar to telephone companies, newspapers, broadcasters, and cable television providers.[268] To the extent that, without interference from the ISP, users determine what information they will send and what they want to receive, ISPs function as conduits for information.[269] Examples of such conduit services include access to the World Wide Web, e-mail, chat rooms, hosting user webpages, and telephony.[270] Similarly, as discussed in the context of FCC regulation, with respect to the underlying facilities and services that allow ISPs to transmit their data for all of their information services, ISPs also act as conduits for information as opposed to speakers.[271]

To the extent that ISPs determine the information that users may receive, they are speakers. This occurs, for example, when ISPs provide content to their users through webpages, provide links to other content providers, determine what pop-up displays will appear to users, select the news groups that are available to their users, and when they edit information placed on their system by others.[272] Under those circumstances, ISPs arguably exercise the kind of editorial control treated as speech and traditionally protected under the First Amendment.[273]

Lastly, since ISPs can ultimately censor and block everything that occurs over their networks, they are potent, though limited, Internet gatekeepers. They are potent in the sense that they may control and silence all speech on their networks. Through firewalls and

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268. *See* Hammond, *supra* note 59, at 205 (stating that broadband Internet technology "combines many of the capacities of its predecessors").

269. *See Universal Serv. Report*, 13 F.C.C.R. 11,501, 11,537-38, ¶ 76 (1998); *Transfer Order*, 14 F.C.C.R. 3160, 3192-93, ¶ 64 (1999).

270. *See Universal Serv. Report*, 13 F.C.C.R. at 11,537, ¶¶ 76-80.

271. *See supra* notes 134-138 and accompanying text.

272. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (concluding that an ISP's exercise of editorial control represented the actions of a publisher).

273. *Cf.* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (recognizing the editorial rights of newspapers).

passwords, ISPs can control access to their networks.[274] Once users are on those networks, ISPs have the ability to prescreen and monitor their activity. For example, AOL requires users to comply with its Rules of User Conduct and Community Guidelines which prohibit, among other things, users from "posting information in or otherwise using any communications service [available] on or through this site" that contains "explicit or graphic descriptions or accounts of sexual acts,"[275] and "reserves the right, in its sole discretion, to terminate [user] access to all or part of [its network], with or without notice."[276] In addition to controlling user conduct, ISPs assert the right to use and control the information available on their networks. For example, AOL reserves the right to remove any content at its discretion,[277] and to "use, reproduce, display, perform, adapt, modify, distribute, have distributed, and promote" any content posted or submitted by users on its system.[278] ISPs may also be considered limited gatekeepers, however, because they have absolutely no control over speech on the other networks of the Internet and because users can always change ISPs or become ISPs themselves.[279] Any attempt to fit ISPs into the rigid categories of traditional First Amendment jurisprudence, therefore, would either oversimplify the complexity of Internet service or ignore the unique characteristics of this new form of communication.

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274. *See supra* note 216. Through software, ISPs may even be able to control user activity outside of their network. For example, a recent lawsuit alleges that AOL's new software prevents users from accessing competing ISP accounts. *See* Associated Press, *Lawsuit Claims AOL 5.0 Blocks Rival Services*, CNET NEWS.COM, Feb. 2, 2000, *at* http://news.cnet.com/news/0-1005-200-1540024.html; *Class-Action Suit Calls on AOL*, WIRED NEWS, Feb. 2, 2000, *at* http://www.wired.com/news/print/0,1294,34063,00.html.

275. *AOL Rules of User Conduct*, *at* http://www.aol.com/copyright/rules.html (last visited Aug. 25, 2000) [hereinafter *AOL Rules of Conduct*]; *see also* AOL Hometown, *Community Guidelines* (prohibiting users from using AOL Hometown to distribute certain content), *at* http://hometown.aol.com/flanker.adp (last visited Oct. 4, 2000).

276. *AOL.COM Terms and Conditions of Use*, at http://www.aol.com/copyright.html (last visited Aug. 25, 2000) [hereinafter *AOL Terms of Use*]; *see also AOL Rules of Conduct*, *supra* note 275 (noting its ability to "pre-screen, monitor, or edit" content posted by users); Prodigy.com, *Terms of Use* (noting that any communication or material transmitted to Prodigy.com is considered nonconfidential and nonproprietary, and may be used by Prodigy for any purpose), *at* http://prodigy.com/pcom/company_information/copyright.html (last visited Aug. 26, 2000) [hereinafter *Prodigy Terms of Use*].

277. *AOL Rules of Conduct*, *supra* note 275.

278. *AOL Terms of Use*, *supra* note 276; *see also Prodigy Terms of Use*, *supra* note 276 ("Prodigy is free to use any ideas, concepts, know-how, or techniques contained in any communication you send to the Site for any purpose whatsoever . . . .").

279. *See supra* notes 207-215 and accompanying text.

B. *Three Methods for Analyzing ISPs Under the First Amendment*

In light of the different functions and services provided by ISPs, three approaches for analyzing the First Amendment claims of ISPs are possible: categorical, functional, and editorial. Each has substantive roots in existing First Amendment law, and all three have been applied in other contexts. The differences between these methodologies reflects how each weighs the competing values at stake in open access. Before we can determine which approach, if any, is called for under the First Amendment, a determination must be made as to the First Amendment significance of those values. A detailed discussion of that question, however, is beyond the scope of this Article.

1. The Categorical Approach

The categorical approach treats ISPs as speakers for all purposes.[280] The basis for this approach is an ISP's ownership and ultimate power to control its networks.[281] In other words, an ISP's ownership and control of its networks would be treated as the equivalent of the ownership and editorial control of newspaper publishers, without any corresponding limitation due to the means of dissemination or the type and source of information disseminated.[282] The fact that the services of an ISP may be divided into distinct functions such as telecommunications services, e-mail, access to the World Wide Web, and presentation of original content, is subordinated to the ISP's ownership and control of its network. Justice Thomas proposed a similar approach in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, when he argued that a cable operator's right to decide what programming to carry over its network is "preeminent."[283] The categorical approach would justify

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280. While it is theoretically possible to argue for a categorical approach that would strip ISPs of all First Amendment rights, given that most ISPs do in fact provide content and exercise editorial control over what is made available on their networks, such an approach would be inherently inconsistent with the First Amendment.

281. *Cf.* CompuServe Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1017 (S.D. Ohio 1997) (holding that an online service provider could sue the transmitter of unsolicited e-mail advertisements for trespass to personal property); Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 437 (E.D. Pa. 1996) (holding that a private online company may block unsolicited e-mail advertisements from reaching its privately owned e-mail server); *supra* notes 218, 274-278 and accompanying text.

282. *See generally* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (discussing a newspaper publisher's control of the content of the newspaper and its First Amendment protection).

283. 518 U.S. 727, 816 (1996) (Thomas, J., dissenting in part). According to Justice Thomas, a cable operator, as the owner of the property, is in the same position as the owner of a bookstore, and is entitled to the same First Amendment protection. *Id.*

the ISP's corresponding power to privately censor or restrict speech on its network because no single ISP has the power to reduce speech over the Internet as a whole.[284] Given the Supreme Court's current reluctance to adopt an absolutist approach to new technology, however, it appears unlikely that it would adopt such an approach with respect to the Internet.[285] Furthermore, a weakness of the categorical approach is its dependence upon the factual predicate that Internet users have alternative means of accessing the Internet to alleviate concerns over private censorship.[286]

2. The Functional Approach

In contrast, the functional approach would conceptually sever the services offered by ISPs and assign fixed First Amendment rights and duties to each distinct Internet service.[287] The functional approach would distinguish between services in which the ISP can be treated as a mere conduit for the speech of others and those in which the ISP can be considered the speaker. For example, with respect to the transmission of data through the underlying network, e-mail, and World Wide Web access, ISPs could be treated as computer-mediated common carriers, and prohibited from exercising editorial control over these services.[288] In contrast, ISPs as website publishers would be

284. *See supra* notes 155, 216-218, 241-243 and accompanying text.

285. *See Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 741-42 (plurality opinion) (declining to make a "definitive choice among competing analogies (broadcast, common carrier, bookstore)" or "to declare a rigid single standard, good for now and for all future media and purposes"); *id.* at 768 (Stevens, J., concurring) ("[I]t would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this.").

286. *See supra* text accompanying notes 201-220.

287. *See* Philip H. Miller, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147, 1198-99 (1993); *see also* Hammond, *supra* note 59, at 212-13, 216-17 (discussing channel functionalism, which "allow[s] the government to regulate the use of channels or transmission paths based on the type of information transmitted," and operational functionalism, which separates the transmission medium and the message transmitted, regulating the former and not the latter); Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163 (1999) (arguing that the First Amendment analysis should vary depending upon the application involved).

288. *See* Harold Feld, *Whose Line Is It Anyway? The First Amendment and Cable Open Access*, 8 COMMLAW CONSPECTUS 23, 24 (2000) (arguing that cable ISPs should be treated as common carriers); *cf.* FCC v. Midwest Video Corp., 440 U.S. 689, 701 n.9 (1979) (noting that a "cable system may operate as a common carrier with respect to a portion of its service only"); Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) ("Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.").

given full First Amendment protection.[289] In exchange for the ISP's loss of editorial control over services like e-mail, legislatures or courts could correspondingly immunize ISPs from certain liabilities arising from the regulated services.[290] However, unless ISPs agree to these limitations,[291] the functional approach requires either a judicial determination that ISPs categorically have no First Amendment rights with respect to the regulated services, or that legislative efforts restricting the rights of ISPs satisfy heightened scrutiny.

3. The Editorial Approach

Like the functional approach, the editorial approach also conceptually severs the services offered by ISPs. Unlike the functional approach, in which First Amendment rights and duties would be fixed depending upon the particular function, under the editorial approach, the extent of First Amendment protection would vary depending upon whether the ISP actually exercised editorial control over the particular service in question.[292] The decision whether to provide certain

289. *See* Hammond, *supra* note 59, at 216 (stating that, under operational functionalism, the act of creating or editing messages would enjoy full First Amendment protection).

290. This is in part the approach adopted by Congress in the Communications Decency Act (CDA) which states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1) (Supp. III 1997), because ISPs offer "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3). *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."). See also Hammond, *supra* note 59, at 221, who argues that public fora could be created by

> extending the limited liability protections currently enjoyed by common carriers to the providers of broadband public fora. Limitations on liability would include the absence of responsibility or liability for the speech of any user of the forum and a limitation of liability for service failures to the charge made for the service provided.

The CDA, however, also immunizes ISPs even when they exercise editorial control over content created by third parties, *see Zeran*, 129 F.3d at 331 ("Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services."), creating a dangerous incentive for private censorship.

291. *See* Caruso, *supra* note 2 (discussing the need for industry cooperation with government in establishing public policy with respect to broadband networks).

292. In *Miami Herald Publishing Co. v. Tornillo*, the Court discussed the issue with respect to newspapers:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.

services or functions would not be treated as an exercise of editorial discretion under this approach. Otherwise, the editorial approach would be no different than the categorical approach. Instead, decisions to offer a particular communication service would be treated as an economic decision similar to decisions to offer telephony, three-way calling, or call waiting.[293] Under this approach, if an ISP desired to edit the content of e-mail or limit the pages that Web surfers could access and thus become to some degree responsible for the content of those services, it would be entitled to heightened First Amendment protection.[294] Correspondingly, if an ISP refrains from exercising editorial control over services such as e-mail, its First Amendment rights would diminish along with its liability for the content provided by others.[295] The choice would be the ISP's. Ultimately, this approach is based upon the conclusion that the exercise of editorial control over a computer network, as opposed to control in general, represents protected speech. Like the categorical approach, however, the editorial approach raises the specter of private censorship.

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418 U.S. 241, 258 (1974). By focusing upon the editorial control of an ISP, this approach differs from attempts to impose public/private fora doctrine upon new technologies by determining whether the network owners have opened up their property for expressive purposes and to what extent they may be exercising monopoly power. *See* Hammond, *supra* note 59, at 217-23 (arguing that the public forum doctrine is the appropriate means for analyzing the claims of broadband providers).

293. *See Universal Serv. Report*, 13 F.C.C.R. 11,501, 11,530, ¶ 60 (1998) (stating that a local exchange carrier's decision to provide an information-storing service such as voice mail does not change its status from a telecommunications provider to an information service provider).

294. In *Blumenthal v. Drudge*, the district court recognized that AOL has the right "to exercise editorial control over those with whom it contracts with and whose words it disseminates," hence it "is not a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility for what is said over the telephone wires." 992 F. Supp. 44, 51 (D.D.C. 1998). Thus, "it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor." *Id.* at 51-52; *see* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (holding that Prodigy should be held to strict liability as an original publisher of defamatory material because it advertised its practice of controlling the content on its service and because it actually screened and edited messages on its bulletin board).

295. *See* Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991) (treating an ISP as a distributor of publications under defamation law because it had "little or no editorial control over [the] contents"). In contrast to the CDA, *see supra* note 290, this appears to be the approach adopted by Congress in the Online Copyright Infringement Liability Limitation Act, in which online service providers are immune from claims of copyright infringement as long as they do not exercise any control over the infringing material. *See* 17 U.S.C. § 512(a) (Supp. IV 1998); *see also* Lunney v. Prodigy Servs. Co., 723 N.E.2d 539, 541-42 (N.Y. 2000) (holding that Prodigy could not be held liable for defamatory e-mail or bulletin board messages when it did not exercise any editorial control over the content).

C. *Severance and Open Access: What's Good for the Goose Is Good for the Gander*

While the FCC could avoid unbundling the various Internet services and treat ISPs as an information service under the Telecommunications Act,[296] a distinct choice must be made with respect to the First Amendment. Accordingly, before any effort to impose access requirements upon ISPs can be considered constitutional, a decision must be made as to how ISPs are to be treated under the First Amendment. With respect to open access, the decision leads to a First Amendment catch-22. If we adopt the categorical approach, open access is inconsistent with the First Amendment for the reasons set forth in Part IV.[297] If instead, we adopt the functional or editorial approach and conclude that cable systems are not speakers with respect to the information carried through their property,[298] then competing ISPs are stripped of any free speech claims as well. While competing ISPs may claim that the vertical integration of broadband providers with ISPs, such as TCI and @Home, may raise antitrust concerns by reducing the ability of ISPs to compete for the opportunity to provide Internet access,[299] they cannot argue that it limits their ability to speak.

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296. *See supra* Part III.A. The FCC's conclusion that ISPs are not common carriers subject to Title II requirements does not address whether the enhanced services provided by ISPs actually represent speech on the part of ISPs.

297. *See supra* Part IV.B.

298. *See supra* notes 261-296 and accompanying text. Such a conclusion effectively turns cable ISPs' claims into property claims, as opposed to First Amendment claims.

299. *See* AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1150 (D. Or. 1999), *rev'd*, 216 F.3d 871 (9th Cir. 2000); *Transfer Order*, 14 F.C.C.R. 3160, 3197-98, ¶ 75 (1999).

The arrangement between AT&T and @Home represents in the language of antitrust, a potential vertical restraint of trade. "An economic relationship is "vertical" where it links two markets in the same chain of manufacture and distribution, usually through the linkage of two firms that either do or could stand in the relationship of supplier and customer." ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 99-100 (3d ed. 1992). The Supreme Court has recognized, however, that vertical agreements that do not restrain prices have "potential for . . . stimulation of interbrand competition." Continental T.V., Inc. V. GTE Sylvania Inc., 433 U.S. 36, 51-52 (1988). In fact, the Court has stated:

> [A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. If the restraint stops at that point—if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.

United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967). Accordingly, the existence of alternative sources of broadband communication capable of competing with cable would mitigate if not undermine any antitrust claim.

In general, First Amendment concerns with respect to access to private property are limited to the public's ability to disseminate and receive information against the wishes of the property owner.[300] The issue is determining when private property owners, such as mall owners, can be forced to allow the public to use their property for expressive purposes.[301] Under certain circumstances, the Supreme Court has recognized that free speech concerns may outweigh a property owner's right to control the use of his or her property.[302] However, any approach that conceptually severs the various services and functions provided by cable ISPs into speaking and nonspeaking elements must necessarily sever the functions and services of the ISPs seeking access as well. In so doing, competing ISPs are stripped of any claims that the First Amendment entitles them to a right of access. As discussed above, given the architecture of the Internet, competing ISPs are not seeking access in order to speak.[303] Furthermore, competing ISPs have access to alternative means for delivering their messages to the Internet, and their speech is readily accessible over the Internet and through the cable networks.[304] Instead, competing ISPs

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300. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-25, at 998-1010 (2d ed. 1988) (examining the free speech rights of the public in private forums); David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway*, (*Where Are the Public Forums on the Information Superhighway?*) 46 HASTINGS L.J. 335, 350-54 (1995) (discussing whether the private networks of the Internet could be considered public forums); David Ehrenfest Steinglass, *Extending* Pruneyard: *Citizens' Right to Demand Public Access Cable Channels*, 71 N.Y.U. L. REV. 1113, 1114-15 (1996) (arguing that the public forum doctrine should be extended to cable television in order to provide the public with an opportunity to speak through cable); Noah D. Zatz, Comment, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 151-52 (1998) (arguing that the First Amendment requires the creation of spaces in Cyberspace where public speech can occur).

301. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77-101 (1980) (analyzing whether state recognition of the free speech rights of mall patrons violated the U.S. Constitution); Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 445-47 (E.D. Pa. 1996) (analyzing whether a commercial transmitter of unsolicited e-mail advertisements had a free speech right to reach the members of AOL through AOL's privately owned e-mail server).

302. *See PruneYard*, 447 U.S. at 83 (holding that states may recognize the public's right to speak in a private mall without violating the mall owners' federally protected property rights because the shopping center was a commercial establishment spanning several city blocks and was "open to the public at large"); *Cyber Promotions*, 948 F. Supp. at 445-47 (rejecting claim that a commercial transmitter of unsolicited e-mail advertisements had a free speech right to reach the members of AOL through AOL's privately owned e-mail server because "AOL has never presented its e-mail servers to the public at large for dissemination of messages"); N.J. Coalition Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 766-68 (N.J. 1994) (noting that "shopping centers . . . have in fact significantly displaced downtown business districts as the gathering point of citizens").

303. *See supra* notes 155, 216-218, 241-243 and accompanying text.

304. *See supra* notes 155, 216-218, 226-236, 241-243 and accompanying text.

are seeking access to cable networks in order to sell the public broadband access to the Internet.[305] In other words, competing ISPs are not attempting to make their speech available to customers, they are seeking to become broadband conduits themselves by using the property of cable companies.[306]

The following hypothetical illustrates why open access does not implicate the First Amendment rights of noncable ISPs. Assume that in Washington, D.C. the only way for speakers to get to and from Congress is by automobile, and while it is possible to drive your own car to Congress, it is currently prohibitively expensive. While the members of Congress have their own personal car services and large corporations have limousines for their executives, most people rely upon taxis to take them to and from Congress. Aside from the investment, there are no barriers to becoming a taxi driver. As a result, speakers have a choice of taxis to take them to their speaking engagements, each with its own advantages and disadvantages: some taxis are newer, some are faster, some are larger, some bombard their passengers with advertisements, others leave the passenger alone, some are more expensive, and some even offer their services for free. Open access does not seek to require all of these taxis to transport people to Congress on a nondiscriminatory basis, or to carry indigent speakers for free, or to give competitors an opportunity to speak to their passengers while in transit. Arguably, each of these efforts may be seen as an attempt to protect or improve free speech on Capitol Hill by limiting the property rights of the taxi owner.[307] Instead, open access is an effort to force some taxi drivers to share their taxis with competing drivers simply because they are faster. Substitute the Internet for Congress and ISP networks for taxis, and the analogy is complete. Again, while this may raise concerns about competition in

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305. *See* AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1150 (D. Or. 1999), *rev'd*, 216 F.3d 871 (9th Cir. 2000); *Transfer Order*, 14 F.C.C.R. 3160, 3197-98, ¶ 75 (1999).

306. As such, open access may represent an unconstitutional taking of property under the Fifth Amendment to the U.S. Constitution, *see* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."), and unlike the Supreme Court's decision in *PruneYard*, 447 U.S. at 82-84, open access would not be justified as an effort to protect the free speech of the ISPs seeking access.

307. *Cf.* 47 U.S.C. § 315 (1994) (requiring broadcasters to make equal time available to candidates for political office); *PruneYard*, 447 U.S. at 82-85 (holding that states may limit private property owners' rights to exclude individuals seeking to speak on their property); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 387-90 (1969) (upholding the fairness doctrine which required broadcasters to carry the response of individuals responding to a personal attack); Time Warner Entm't Co. v. FCC, 93 F.3d 957, 962 (D.C. Cir. 1996) (upholding the requirement that cable companies set aside channels for public, educational, or governmental programming).

the Internet service market, it does not raise any countervailing First Amendment claims. Open access for competing ISPs, therefore, cannot be justified by principles of free speech.

VI. CONCLUSION

We are poised on the brink of what many are calling the second industrial revolution—the Internet revolution.[308] Even though the Internet has already begun to transform how we communicate, do business, entertain ourselves, and obtain information, it is only the beginning. And while many of us may feel as though we are already left behind by the rapid advances in computer and telecommunications technology, we may take solace in the fact that the law is often even further behind. In our effort to catch up to technology, however, we must take care. In this Article, I have attempted to demonstrate that we must not rush to judgment in our effort to fit the Internet and its players into preexisting conceptual boxes. This is especially true when dealing with policies such as open access that have the potential to affect free speech in the "most participatory form of mass speech yet developed."[309]

As this Article demonstrates, Internet service providers play an important and complex role in connecting the public to the Internet.[310] They simultaneously provide the public with access to e-mail, the World Wide Web, content of their own creation, and the underlying telecommunications networks that transport all of that information.[311] Furthermore, the complexity of Internet service will only increase in the future as the currently disparate media (i.e., print, radio, broadcast, and cable) converge, making the Internet the principal medium for the delivery of all digital information.[312] Given the various services and functions performed by ISPs, evaluating their First Amendment claims is no simple matter. While I have outlined three potential approaches to analyzing those claims (i.e., categorical, functional, and editorial), Professor Lessig may be right when he suggests that, ultimately, in some areas of cyberspace, the Constitution may not dictate any particular approach, and we will have to choose which path to take.[313]

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308. *See* INFORMATION INFRASTRUCTURE TASK FORCE, *supra* note 12, at 1.

309. ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J., concurring).

310. *See supra* Part II.

311. *See Universal Serv. Report*, 13 F.C.C.R. 11,501, 11,536-38, ¶¶ 73-76 (1998).

312. *See* Hammond, *supra* note 59, at 215.

313. *See* LESSIG, *supra* note 32, at 211-12 ("[T]he words of the framers will not carry us far in making the necessary choices. Where translation gives out, a choice must be made.").

However, regardless of which approach we eventually choose for evaluating the First Amendment rights of ISPs, supporters of open access are caught in a First Amendment catch-22. Under the approaches outlined above, open Internet access is either inconsistent with or unsupported by principles of free speech.